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No. 83-2109

IN THE

Supreme Court of the United States

October Term, 1983

RODNEY E. DOMINEY,

Petitioner,

vs.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY CO.,

Respondent.

SUPPLEMENTAL APPENDIX TO THE PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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In the United States District Court for the Northern District of Texas Fort Worth Division.

Rodney E. Dominey vs. The Atchison, Topeka and Santa Fe Railway Company. Civil Action No. CA 4-80-22-E.

Filed: September 7, 1982.

ORDER.

This action was tried to a jury, with a verdict returned for defendant on September 10, 1981. Plaintiff filed a motion for judgment notwithstanding the verdict, or, in the alternative, motion for a new trial. After careful consideration of the motion, the briefs and the arguments presented at the hearing, the Court makes the following ruling:

I. Applicable Law

A. *Sufficiency of Evidence*

Under the Federal Employers' Liability Act (FELA), findings of negligence and causation are within the province of the jury. The Supreme Court of the United States has established that "[o]nly when there is a *complete* absence of probative facts to support the conclusion" can a jury's determination be disregarded. *Lavender v. Kurn*, 327 U.S. 645, 653 (1946) (emphasis added). The definitive rule laid down by the Supreme Court is that the jury's conclusion, "whether it relates to negligence, causation or any other factual matter, cannot be ignored." *Tennant v. Peoria & P.U. Ry.*, 321 U.S. 29, 35 (1944). Thus, if any set of facts or inferences would support the jury's verdict, that verdict must stand.

B. *Intervening Cause*

FELA §3, 45 U.S.C. §53 (1976), provides that an employee's contributory negligence will not bar recovery from a common carrier under FELA. If an employee's act is the *sole* cause of his injury, however, his negligence will preclude recovery. This follows logically, as stated

by Judge John R. Brown, "since a jury, honestly determining that the injured employee's actions were the sole cause of injury, necessarily finds ... that no act of the railroad, *even though found to be negligent,* played any part in bringing about the injury." *Page v. St. Louis Sw. Ry.*, 349 F.2d 820, 827 (5th Cir. 1965) (emphasis added). Again, this question is left for the jury's determination.

II. Jury Instructions

The jury was given proper instructions as to the meaning of negligence and legal cause, Jury Charge, pp. 8-9. It was instructed that negligence would be a "legal cause of damage even though it operates in combination with the act of another ... if the negligence played any part, no matter how small, in causing such damage." Jury Charge, p. 9. This language parallels that of the statute, 45 U.S.C. §51 (1976).

III. Discussion

A. *Questioning the Province of the Jury*

Plaintiff's contentions numbered I through IX each deal with removing certain decisions from the jury. The jury found the defendant negligent in special interrogatories numbers 1 and 3. In each case, of course, the jury *may* have decided the plaintiff's actions were the *sole* cause of any injury. Thus, a lack of causation found by the jury would be proper and logical. "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury ...." *Tennant, supra,* at 35. If plaintiff's injuries were due in *any* part to negligence by the defendant, the jury should have found for the plaintiff, as the instruction quoted above indicates.

In each of the other portions of the jury's verdict there was no negligence found. These findings, as long as supported by some evidence, are totally within the

province of the jury. *See Rogers v. Missouri Pac. Railroad,* 352 U.S. 500, 510 (1957) ("Congress vested the power of decision in these [FELA] actions exclusively in the jury....).

B. *Other Contentions*

Plaintiff contends the jury was guilty of some misconduct. Absent some evidence, this claim has no merit. The exclusion of the evidence mentioned in plaintiff's contention XI, asking a witness for a legal conclusion, was properly excluded. The instruction requesting quotation from the Boiler Inspection Act was unnecessary to charge the jury. The other requested instruction referred to in contention number XII was phrased in the negative, which would tend to confuse a jury. *See Almendarez v. Atchison, Topeka & Santa Fe Ry.,* 426 F.2d 1095, 1097 (5th Cir. 1970).

IV. Conclusion

Based on these points, the Court hereby ORDERS that plaintiff's motion for judgment notwithstanding the verdict or in the alternative plaintiff's motion for new trial is DENIED.

Signed this 7th day of September, 1982.

/s/ ELDON B. MAHON
ELDON B. MAHON

United States District Judge